APPENDIX "A"

Supreme Court of Arkansas

Jimmie L. Walters,
Appellant,
v.
State of Arkansas,
Appellee.
No. CR-73-116

Opinion Delivered Jan. 21, 1974.

Appeal From Van Buren Circuit Court, Joe D. Williams, Judge. Affirmed.

Conley Byrd, Associate Justice

Based upon the conduct of the trial court in discharging a jury and granting a new trial, the appellant Jimmie L. Walters seeks to set aside his subsequent second degree murder conviction upon the ground of former jeopardy or at least to reduce the conviction thereof to a degree not greater than involuntary manslaughter.

The record before us as to what occurred in the first trial is rather meager. The portion upon which appellant relies is set forth in a motion to dismiss as follows:

> "That at the conclusion of the first trial of this defendant, the jury retired to deliberate a verdict and during the course of said deliberation, the Jury reported to the Court that they could not reach a decision and were hung. While determining whether the jury could reach a verdict, the following conversation between the Court and the Jury Foreman occurred:

Court: Have you reached a verdict?

Foreman: No, sir.

Court: What are your numbers now?

Foreman: 7 to 5.

Court: Ladies and gentlemen of the jury, I know some Courts follow the procedure of locking up juries and keeping them for days and often times by doing it, they get a verdict, but this Court doesn't believe in that. I believe that's subjecting you to torture. That's not what you are down here for, to be tortured. You are just citizens doing your duty. You have told me there were two things you were considering—guilt or innocence?

Foreman: Yes, sir.

Court: If the proposition had been voted on, what would have been the degree?

Foreman: About the least.

Court: You mean you were hung up between involuntary manslaughter and not guilty?

Foreman: Yes, sir."

The doctrine of former jeopardy has been set forth in *Atkins v. State*, 16 Ark. 568, 578 (1855) in this language, quoting from the still leading case of *United States v. Perez*, 9 Wheat. 579. 6 L. Ed. 165 (1824):

" 'We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all

> the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oath.' "

We do not read anything in *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961), nor in *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1970), as holding to the contrary.

Because of the fact the trial court went beyond the determination that the jury was hung between guilt and innocence and determined that they were hung between a verdict of involuntary manslaughter and not guilty, appellant suggests there was a preoccupation by the trial court in helping the prosecution obtain a conviction. While we must admit that the inquiry was inadvisable, we cannot read appellant's suggestion into this meager record. It appears to us that the trial court had already indicated that he was going to grant a mistrial before making the inquiries as to involuntary manslaughter and not guilty. On the meager record before us we cannot say that the trial court abused his discretion in determining that the jury was hopelessly deadlocked. Consequently, we need not speculate as to what our conclusion would have been had such information been first obtained or had the record shown how long the jury had been deliberating.

Neither can we agree with appellant that the first trial resulted in an implied acquittal of all degrees in excess of involuntary manslaughter. The statements between the trial court and

the jury foreman cannot be considered under the circumstances as a verdict of the jury. See Ark. Stat. Ann. § 43-1226 (Repl. 1968).

Affirmed.

Harris, C. J., not participating.

APPENDIX "B"

Guilty verdict. Felony

In the Circuit Court of Van Buren County, Arkansas

Criminal Docket

State of Arkansas — Plaintiff

vs. — No. CR5-73

Jimmie L. Walters — Defendant

Judgment

On this 10 day of May, 1973, same being a day of the May term of this Court there appears the State of Arkansas by Kenneth Smith Prosecuting Attorney and the defendant appears in person and by his attorney Buford Gardner and Defendant waives arraignment and enters a plea of not guilty to the charge of Murder in the First Degree as charged in the information filed herein.

All parties announce ready for trial and there is duly empaneled and sworn a jury consisting of twelve petit jurors for the term, to-wit: Robert R. Shannon and eleven other jurors, to try this cause after they have been examined as to their qualifications and all found competent.

This cause was submitted to the said jury upon the evidence introduced, the instructions of the Court and the argument of counsel and the jury retired to consider its verdict and after due deliberation the jury returned into Court the following

verdict: We the jury find the defendant guilty of murder in the second degree and fix his punishment at . . . . . with the Arkansas Dept. of Correction.

/s/ Robert R. Shannon
Foreman

It Is Therefore by the Court Considered, Ordered and Adjudged that the defendant is hereby adjudged to be guilty of the crime of Murder in the Second Degree and the defendant is remanded to the custody of the Sheriff of this county to be by him kept in custody until such time as it may be found convenient to transfer custody to the Superintendent of the Arkansas Department of Correction, there to be confined at hard labor for a period of five years from this date.

/s/ Joe D. Villines
Circuit Judge

Filed for record on this 10th day of May, 1973, at 6:45 P.M., and the same is now duly recorded in Circuit Court Record J, on page 1, on this 11th day of May, 1973.

Sammy Collums
Clerk

By: /s/ Rita Richardson
Deputy Clerk